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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ORIGINAL

In the matter of

Amendment of Part 90 of  
Commission's Rules to Facilitate  
Future Development of SMR Systems  
in the 800 MHz Frequency Band

PR Docket No. 93-144  
RM 8117, RM 8030  
RM 8029

and

Implementation of Section 309(j)  
of the Communications Act-  
Competitive Bidding  
800 MHz SMR

PP Docket No. 93-253

To: The Commission

COMMENTS OF E.F. JOHNSON COMPANY

E.F. JOHNSON COMPANY

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## SUMMARY

E.F. Johnson Company ("E.F. Johnson"), a leading manufacturer and designer of radio communications and specialty communications products for commercial and public safety use, hereby submits its Comments in response to the Further Notice of Proposed Rule Making ("Further Notice") in PR Docket No. 93-144. In this proceeding, the Commission proposes a new framework for licensing of Specialized Mobile Radio ("SMR") systems in the 800 MHz band.

E.F. Johnson submits that an auction of SMR spectrum to create wide area systems is unnecessary and not in the public interest in light of the maturity of the SMR industry. Rather, the Commission should focus its efforts on the continued licensing of SMR systems as they are today. Other regulatory changes, less dramatic in nature, can achieve regulatory parity between SMR and other mobile services.

Nevertheless, if the FCC proceeds with the authorization of wide area systems in the manner proposed, E.F. Johnson does not object to the Commission's proposal to allocate 10 MHz of spectrum for Metropolitan Service Area ("MTA") based licensing in 2.5 MHz blocks. E.F. Johnson supports the continued authorization of local SMR systems on a site-by-site basis.

Additionally, E.F. Johnson supports the Commission's proposal not to require relocation of existing SMR licensees whose systems are located within the 200 channels designated for MTA based licensing. The relocation of existing users is not critical to the introduction of wide area SMR service. Moreover, the Commission should afford existing local SMR licensees an opportunity, for a six month period, to submit

applications to modify their facilities prior to the time any MTA based or other wide area SMR license applications are filed.

Furthermore, non-wide area SMR systems should not be regulated in the same fashion as wide area SMR providers. The two services should be subject to different regulatory treatment. E.F. Johnson submits that a presumption of CMRs status should not apply to licensees authorized for the 80 locally licensed SMR channels. There is a significant difference in the types of service that local SMR systems and wide area SMR systems (including cellular and broadband PCS systems) can efficiently provide. Accordingly, the regulatory structure for local SMR systems should not be substantially similar to wide area SMR, cellular or PCS systems.

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800 MHz SMR )

To: The Commission

**COMMENTS OF E.F. JOHNSON COMPANY**

E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys,  
pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications  
Commission ("FCC" or "Commission") hereby submits its Comments in response to the  
Further Notice of Proposed Rule Making ("Further Notice") adopted in the above  
referenced proceeding<sup>1</sup> designed to implement a new framework for licensing of  
Specialized Mobile Radio ("SMR") systems in the 800 MHz band.

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<sup>1</sup> Further Notice of Proposed Rule Making, P.R. Docket No. 93-144, FCC 94-271 (released November 4, 1994). The Commission extended the time for the submission of Comments and Reply Comments in this proceeding. See, Order, P.R. Docket No. 93-144, DA 94-1326 (released November 28, 1994).

## I. INTRODUCTION

E.F. Johnson is a leading manufacturer and designer of radio communications and specialty communications products for commercial and public safety use. Founded over 70 years ago as an electronics components manufacturer, E.F. Johnson entered the radio communications equipment market in the late 1940's and is one of the three largest providers of land mobile radio systems in the United States. It produces base stations, vehicular-mounted and portable transmitters that operate in various portions of the radio spectrum that are used by a variety of entities requiring communications capabilities. Among other frequency bands for which the company manufactures products is the 800 MHz band.

In this proceeding, the Commission proposes rules for assignment of blocks of SMR spectrum in defined market-based service areas in order to facilitate the development of wide-area, multi-channel SMR systems. The FCC also proposes that a portion of the 800 MHz spectrum dedicated for SMR operations remain available for local (non wide area) use. The Further Notice recommends new application and licensing procedures for both the wide area and local systems.

This proceeding is an outgrowth of two regulatory activities already underway. First, the FCC was contemplating the authorization of wide area SMR systems, at the request of several members of the SMR industry.<sup>2</sup> Subsequently, however, the FCC was

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<sup>2</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, P.R. Docket No. 93-144, Notice of Proposed Rule Making, 8 FCC Rcd 3950 (1993).

required, pursuant to Congressional mandate, to reregulate the 800 MHz SMR industry, in order to achieve regulatory parity among the mobile communications services. As a result, the Commission initiated the Docket No. 93-252 proceeding. In the Third Report and Order<sup>3</sup> in that proceeding, the FCC concluded that the SMR rules governing wide area SMR systems should be comparable to the rules governing the other commercial mobile radio service ("CMRS") providers.

E.F. Johnson has been an active participant in both the Docket Nos. 93-144 and 93-252 proceedings. The Further Notice continues the FCC's efforts to impose a new regulatory scheme on a mature 800 MHz SMR industry, largely ignoring the substantial number of existing SMR operators. This proceeding will have a dramatic impact on these operating businesses. Many of these operators employ products that use the Company's LTR® signaling format. Because of the restructuring of the 800 MHz SMR spectrum envisioned in the Further Notice, these entities may no longer remain in the SMR business, discontinuing their use of the Company's products and discontinuing service to the many consumers of traditional two-way radio service. Finally, the Company supports a network of over 600 dealers nationwide, many of whom hold licenses for 800 MHz systems. The Company's dealers will be dramatically affected by the new regulatory structure. Accordingly, E.F. Johnson is pleased to have this opportunity to submit the following Comments in response to the Further Notice.

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<sup>3</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, FCC 94-212, adopted August 9, 1994, released September 23, 1994 ("CMRS Third Report and Order").

## II. COMMENTS

### A. The FCC's Proposal Does not Adequately Take into Account the Maturity of the SMR Industry.

The Commission proposes to create a "new" SMR service from existing SMR channels. The new SMR service, which will feature 200 channels of contiguous spectrum, providing wide area SMR capabilities, will employ spectrum now licensed, and in most cases used, by existing SMR operators. In most, if not all, areas of the country, this spectrum will be, by the time the FCC concludes this proceeding, completely licensed.<sup>4</sup> The channels will be authorized for use by entities already providing or proposing to provide service within a limited geographic area ("local SMR" operators) or to entities already providing or proposing to provide service over a broad geographic area, pursuant to rule waivers issued by the Commission ("wide area SMR" operators).

Yet, the Commission would auction this spectrum and correctly not require mandatory relocation of existing users. Apart from the Commission's apparent fascination with auctions even in circumstances where they are logically inappropriate, there is no reason to auction SMR spectrum, creating Metropolitan Service Area ("MTA") licenses, to achieve regulatory parity. The SMR industry has evolved toward local and wide area services. While rule modifications might be required to eliminate

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<sup>4</sup> The FCC recently announced that it would process some 45,000 applications currently pending consideration at its licensing facilities in Gettysburg, PA, with the assistance of several trade associations. It is widely acknowledged, that by the time these applications are processed, there will be no more available SMR spectrum.

the need for waivers to secure a wide area license, other elements of the FCC's proposal make no sense in light of the maturity of the SMR industry and the existence of wide area providers. Auction of SMR spectrum to create wide area systems ignores the wide area systems that are already in place. Moreover, use of the MTA licensing scheme also ignores the existing local SMR licensees who have managed to co-exist with wide area systems.

Instead of creating a new category of service, the creation of MTA licenses will only transfer control over local SMR systems to tower site owners and operators. Under the Commission's proposal, an MTA licensee will not be able to require the relocation of an incumbent licensee. However, if a licensee of channels in the upper portion of the 800 MHz SMR spectrum loses its license, the channels automatically become part of the MTA license. Therefore, if a tower site owner becomes an MTA licensee or becomes affiliated with an MTA licensee, it can accomplish indirectly what the Commission has correctly chosen not to do directly. By validly terminating leases, and requiring licensee relocation in instances where co-channel use otherwise prevents relocation, these tower site owners and managers can force the transfer of incumbents' channels to the MTA licensee. This result will produce a loss of service to the public from established operators, which is not in the public interest.

Even if, at the end of the auction process, existing wide area licensees hold the authorization for the MTA in which they are currently permitted to build out a wide area system, auction of MTA licenses is a waste of the public's resources. Because the FCC will not require mandatory migration, the existing local licensees using spectrum

in the MTA block will be largely unaffected. Accordingly, the Commission will have engaged itself and the SMR industry in a lengthy and expensive process to produce a result that is largely in place today. This expenditure of the public's money is not in the public interest, in light of the current state of the SMR industry. The Commission should, therefore, continue to license wide area SMR systems as they are today and instead, initiate a rule making designed to determine how those wide area licensees, as they already exist, can achieve regulatory parity with other mobile services.

**B. Channel Assignment and Service Areas**

The Commission proposes to allocate 10 MHz of SMR spectrum for MTA based licensing. The FCC also recommends that the 10 MHz be licensed in blocks of 2.5 MHz (four blocks of 50 channels each). While E.F. Johnson believes that an auction of MTA licenses is unnecessary to create a competitive wide area SMR industry, it supports the Commission's approach to channel assignments if the agency proceeds with MTA based licensing. The alternative to licensing blocks of 2.5 MHz, an allocation of all 200 channels to a single entity, is both anti-competitive and unnecessary. While the Company expects that others will argue with the Commission's rationale for selecting 2.5 MHz blocks (because it approximates the 42 channels referenced in an earlier phase of this proceeding), there are other bases upon which this allocation can be supported.

First, the creation of four MTA based licensees will permit competition between providers. As is widely recognized, the FCC's creation of only two licenses for the provision of cellular service in each market, did not promote vigorous competition between licensees in that service. Creation of four licensees will, therefore, provide a

benefit to the public. Second, it is not true that the entire 10 MHz of MTA spectrum will be required by a single licensee to offer service. That prediction is based on existing technology. It is likely that technology developed in the future will support the use of service with considerably less spectrum. The FCC should not lock out competition by allocating spectrum based on existing technology. Finally, the FCC proposes that entities be permitted to aggregate blocks of spectrum. Accordingly, if an entity believes that it can only offer service with more than one 2.5 MHz block, it can secure the use of additional blocks.

The Commission proposes to continue licensing SMR systems on the “lower” 80 SMR channels as well. It inquires whether those licenses should be issued on a site-by-site basis, as they are today, or whether the FCC should auction the spectrum (presumably to the extent there are mutually exclusive applications) on a Basic Trading Area (“BTA”) basis.

E.F. Johnson strongly supports the continued authorization of local SMR systems on a site-by-site basis. This alternative will allow SMR operators to continue to provide truly local service, as opposed to service defined by boundaries that may be irrelevant to the operator. The local SMR operator selects its site to provide service to entities in its geographic area. From time to time, operators may require additional sites in an area, in order to provide expanded coverage to a high density adjacent area, a heavily

traveled traffic corridor, etc. In those instances, an operator can choose to employ an additional site.<sup>5</sup>

In neither case, however, does the local operator desire to provide service throughout an artificially (for its purposes) defined coverage area. Requiring service on a BTA basis will have two negative effects. First, it will potentially require operators to construct facilities where they did not anticipate providing service, in contradiction to their business plans. Second, it will limit the possibility that a co-channel licensee could legitimately reuse those channels to serve an adjacent area. Neither of these results are in the public interest.

### **C. Rights and Obligations of MTA Licensees**

E.F. Johnson strongly supports the Commission's proposal not to require relocation of existing SMR licensees whose systems are located within the 200 channels designated for MTA based licensing. The Commission accurately notes the several compelling reasons for it not to require mandatory relocation.<sup>6</sup> Nevertheless, the FCC seeks further comment on the possibility of employing mandatory relocation. It cites, as an example of where mandatory licensing has occurred before, the Emerging

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<sup>5</sup> The Commission's elimination of the so called "40 mile rule" will allow local operators to establish additional sites to meet these unique coverage requirements, once they have constructed their initial system.

<sup>6</sup> Further Notice at paragraph 33.

Technologies docket, in which it provided for relocation of microwave licensees from the 2 GHz band.<sup>7</sup>

Any reliance on the Commission's creation of the personal communications service ("PCS") by the mandatory relocation of 2 GHz microwave users to support the creation of a wide area SMR service by the mandatory relocation of existing SMR licensees is inapposite. PCS could not exist without the mandatory relocation of microwave users. Because the FCC found that the introduction of PCS was in the public interest, it could logically weigh the introduction of that service against the social cost of relocating microwave licensees. In this instance, however, wide area SMR systems have already been authorized by the FCC. Many entities have received rule waivers to offer wide area service, and several of those companies have begun to provide wide area SMR service.<sup>8</sup> The introduction of these services has occurred without mandatory migration of existing users interspersed among the wide area licensees' channels. As noted above, it may be worthwhile to provide for the authorization of these systems by rule, rather than by waiver. However, it is simply not true, as it was in the PCS context, that the relocation of existing users is critical to the introduction of wide area SMR service.

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<sup>7</sup> See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992), Second Report and Order, 8 FCC Rcd 6495 (1993), Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993).

<sup>8</sup> See Land Mobile Radio News, October 21, 1994; See also Land Mobile Radio News, May 20, 1994.

Instead, the mandatory relocation of existing licensees would only make the provision of wide area SMR service easier and potentially less expensive for wide area licensees. The need for contiguous spectrum, which would underlie the mandatory relocation, is presumably based upon the wide area licensee's desire to use a particular technology in which contiguous spectrum is beneficial. However, the FCC should not require relocation because of a licensee's interest to use a particular technology, which may be outdated by the time it is introduced. Because there are presumably technologies that do not require contiguous spectrum to provide wide area service, it is not in the public interest to require mandatory relocation to meet the technological needs of today's wide area operators to the detriment of local SMR providers who continue to offer a valuable service.

Moreover, wide area licensees cannot complain now that it is impossible, or even unattractive to offer wide area service unless the Commission requires mandatory relocation. Today's wide area licensees entered the wide area SMR service, intending to compete with other forms of mobile telephony, knowing the rules governing the use of SMR spectrum. For them to now complain about those rules demonstrates a considerable boldness. If it was not attractive to enter the wide area SMR marketplace under the existing regulations, those licensees should not have sought to offer service in the first instance. The Commission should not rectify that inadequate business planning at the expense of local operators.

The Commission proposes that an MTA licensee be required to protect an incumbent licensee by locating its facilities at least 70 miles from the incumbent's

system or by complying with the "short spacing" table contained at Section 90.621 of the rules. The FCC further proposes that it establish a fixed radius protected area within which the incumbent licensee could relocate its system. The Company believes it is critical that the Commission afford incumbent licensees the opportunity to relocate their systems within their coverage areas. While the FCC envisions that this flexibility would permit establishment of low power sites, without the capability proposed, incumbent licensees would be hostages of tower site owners and operators. Today, wide area SMR licensees have "surrounded" local SMR operators, who, because of existing co-channel separation requirements, are unable to relocate their facilities. The Commission should alleviate the problem as it exists today, as well as cure the problem that may occur in the future with the establishment of MTA licensees.

In particular, the Company urges the Commission to adopt regulations that would permit incumbent licensees to relocate their facilities in the event that their current transmitter location becomes unavailable or unattractive. The Company recommends, therefore, that incumbent licensees be permitted to relocate their facilities to the farther of the following distances: 1) ten miles from the site authorized (or applied for) as of the date that the MTA licensee secures an authorization; or 2) to any site which, based upon an appropriate engineering statement, does not extend the incumbent licensee's coverage area. In this manner, incumbent licensees can be protected against natural disasters as well as tower site owners that wish to take advantage of their inability to move.

The FCC has not accepted applications for modification of existing SMR authorizations since August 9, 1994. Accordingly, many licensees who constructed systems since that time and who could not employ sites originally designated on their applications relied upon grant of special temporary authority ("STA") to meet their construction requirements. If these licensees are not permitted to submit applications for modification in advance of the Commission's acceptance of applications for MTA or other wide area systems, the local licensees may be unable to permanently relocate their facilities because they will subsequently be "surrounded" by the MTA or wide area licensee. Accordingly, in addition to the flexibility, recommended above, for incumbent licensees once MTA licenses are granted, the Commission should afford existing "local" licensees an opportunity, for a six month period, to submit applications for modification, prior to the time the FCC accepts any MTA based or other wide area SMR license applications. Those applications would be evaluated based upon the co-channel landscape existing as of the time the application freeze went into effect and before the submission of any MTA based applications.

**D. SMRs on General Category Channels and Inter-category Sharing.**

As reiterated below, and as demonstrated by the Company in its comments in the Docket No. 93-252 proceeding, non-wide area SMR systems should not be regulated in the same fashion as wide area SMR providers. This proceeding serves to reinforce the Company's position and eliminate any rationale for treating local and wide area SMR providers the same. Here, the Commission attempts to structure the regulations to make wide area SMR systems competitive with other forms of "broadband" mobile

telephony (i.e., broadband PCS and cellular). However, it recognizes that local SMR service is qualitatively different. Accordingly, as argued below, the two services should be subject to different regulatory treatment.

Based upon this recognition that wide area and local area SMR licensees will provide different services from each other, the Commission should continue to make available sufficient spectrum for local SMR service. That spectrum should be available from: the existing "Pool" channels, for expansion of existing systems under today's rules; the current General Category channels; and the "lower" 80 SMR channels. Because the Company believes (as more fully explained below) that local SMR systems are not necessarily CMRS, none of these channels would be subject to competitive bidding.

The Company recognizes that by continuing to classify these three categories of channels as non-CMRS, they may be attractive to wide area SMR licensees, as a means to complement their existing channel holdings, without paying for the use of the channels through an auction. Consequently, E.F. Johnson recommends that these channels be available primarily for local SMR use. The channels could be included in wide area systems, under the regulations governing local SMR licensees. Therefore, if wide area licensees are permitted to reuse their channels throughout an area, this ability would extend only to the "upper 200" SMR channels. Local SMR channels, whether derived from the "lower 80" SMR group, the General Category, or inter-category sharing, would be licensed on a site-by-site basis.

#### **E. Regulatory Classification of Licensees**

The Commission inquires whether the presumption of CMRS status should apply to licensees authorized for the 80 locally licensed channels. E.F. Johnson submits that no such presumption should apply. As an initial matter, the Company believes that the Commission's interpretation of the Budget Act<sup>9</sup>, which prompts it to require similar regulatory treatment for local and wide area SMR systems, is incorrect. In the Third Report and Order, the Commission found that because all mobile communications services are substitutable, they should all be subject to substantially similar regulatory treatment. The Department of Justice, with obviously more expertise than the FCC, found otherwise.<sup>10</sup> It determined that the market for existing SMR service is discrete, and required protection from attempted anticompetitive behavior.

The DOJ's determination confirms the Company's assertions, that there is a significant difference between the type of service that local SMR systems and wide area SMR systems are, or will be, capable of offering. Not all mobile communications services are the same. It is incorrect, therefore, to presume that these licensees should be subject to CMRS status. Because the Commission has incorrectly concluded that local SMR and wide area SMR operators provide substantially similar services and consequently should be subject to similar regulatory structures, the Company has

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<sup>9</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI Section 6002(b), 107 Stat. 312,392 (1993).

<sup>10</sup> U.S. V. Motorola, Inc. & Nextel Communications, Inc.; Proposed Final Judgment and Competitive Impact Statement, 59 FR 55705 (1994).

sought reconsideration of the Commission's decision in the Third Report and Order challenging the regulatory structure the Commission seeks to impose on local SMR systems.

In its Petition for Reconsideration, the Company points out that there is a significant difference in the type of service that local SMR systems and wide area SMR systems (including cellular and broadband PCS systems) can efficiently provide. Local SMR systems are, and under the regulations proposed in this proceeding, will be authorized for a limited number of channels and consequently cannot employ frequency reuse techniques. It is the authorization of sufficient spectrum, envisioned in this proceeding for MTA based licensees, that will allow wide area SMR systems to employ frequency reuse, creating the capacity that enables those systems to offer services that will be similar to those offered by cellular and PCS operators. These systems are designed, and the DOJ found that they do, in fact, serve distinct market segments. Accordingly, the regulatory structure for both trunked and local SMR systems should not be substantially similar to wide area SMR, cellular or PCS systems.

### **III. CONCLUSIONS**

The proposed regulatory structure for SMR licensing does not sufficiently take into account the established SMR industry. The Commission should refrain from implementing an auction of SMR spectrum and should continue to license wide area SMR systems as they are today. If an auction is conducted, however, the Commission should implement its proposal to allocate a 10 MHz block of spectrum for MTA based licensing in 2.5 MHz blocks and should continue to authorize local SMR systems on a

site-by-site basis. It is neither necessary nor just to relocate existing SMR licensees whose systems are located within the 200 channels designated for MTA based licensing.

Finally, non-wide area SMR systems should not be subject to the same regulatory treatment as wide area SMR systems. The two services are distinct product markets. A presumption of CMRS status should not apply to local SMR licensees as they offer a service that is not substantially similar to that of wide area SMR, cellular, or PCS providers.

**WHEREFORE, THE PREMISES CONSIDERED,** the E.F. Johnson Company hereby submits the foregoing Comments and urges the Commission to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

**E.F. JOHNSON COMPANY**

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